

CHIEF JUDGE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ELLEN B. REICHE,
Defendant.

) No. CR 20-215-RSM
}
) MOTION TO SUPPRESS (Physical
) Evidence and Statements)
}
) Noted for: August 6, 2021
}
) [Oral Argument, Evidentiary Hearing
) Requested]
}

Ellen Reiche, through counsel, moves for an order suppressing physical evidence recovered from a warrantless search of a grocery bag located at the scene of the arrest. Additionally, the defense moves for an order suppressing alleged statements Ms. Reiche made after she was functionally under arrest but prior to police reading the *Miranda* rights. An evidentiary hearing is necessary to resolve important factual disputes relevant to this motion.

I. BACKGROUND

On November 28, 2020, in the late evening, BNSF railroad police received a motion alert from a game camera focusing on the nearby tracks in Whatcom County. Deputy Tyler Nies reviewed the footage and saw a trespasser on the railroad tracks. Deputy Nies also observed either another person kneeling on the tracks or perhaps an “item sitting on the tracks.” The time stamp of this footage was 11:24pm. Exhibit 1. Deputy Nies then contacted the Whatcom County Sheriff’s Office to investigate.

1 After notifying the Sheriff's office, Deputy Nies noticed a "track indication"
 2 appear and disappear from the dispatch screen at approximately 11:41pm. Deputy Nies
 3 will testify that a "track indication" signal means the track is either occupied or
 4 obstructed. Deputy Nies will also testify that prior to this event, there had been several
 5 discoveries of "shunts" or "shunting devices" along that railway corridor over the past
 6 year from January of 2020. A "shunt" or "shunting device" will cause the railroad
 7 signals to indicate that a block of tracks up ahead is occupied. A block of tracks is an
 8 area of railroad tracks that extends anywhere from 2 to 10 miles depending on the
 9 topography or track profile. Normally, a train performs this shunting activity in that
 10 when it crosses over or stops at a particular block of tracks, the signals located at the
 11 prior block (from a few miles behind the train) will indicate a red signal telling other
 12 trains that the block ahead is now occupied. A shunting device is created by connecting
 13 wire, or some other electrical conduit, to the tracks to make the signals believe that the
 14 area, or block, is now occupied when in fact it is not.

15 The following facts and time sequence will need to be determined at an
 16 evidentiary hearing. The first to arrive on scene was Whatcom County Sheriff deputy
 17 "D. Chambers." Deputy Chambers identified the two defendants in the area by the
 18 tracks and determined that the two were trespassing. He also noticed that Ms. Reiche
 19 was carrying a grocery bag. Exhibit 2. Upon arrival, Deputy Chambers allegedly
 20 observed the two defendants trying to run from the area but then demanded that they
 21 halt. He then identified himself as a Sheriff's officer and ordered them to come to him.
 22 Both defendants complied with the deputy's commands. The grocery bag was then
 23 placed on the ground.

24 Deputy Chambers noted in his report that he specifically told the two defendants
 25 that they were trespassing on BNSF property, that he needed their identification, and
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1 that they needed to stay put. The defense asserts that at this point, Ms. Reiche was not
 2 free to leave and under these circumstances she was in a custodial environment.

3 Despite the custodial encounter, Deputy Chambers did not Mirandize the
 4 defendants at this time. Instead, Deputy Chambers started questioning the two
 5 defendants. Because co-defendant Brooks has pled guilty, the questions presented to
 6 Ms. Reiche and her responses are only relevant for this motion. In this instance,
 7 Deputy Chambers asked Ms. Reiche about what was inside a grocery bag that was in
 8 her possession prior to the encounter but then placed on the ground once she was
 9 detained. In response to Deputy Chambers' questions, Ms. Reiche made statements
 10 about what was inside that bag. However, at no point prior to asking these questions
 11 did Deputy Chambers advise Ms. Reiche that she has the right to remain silent and that
 12 anything she says could be used against her.

13 Shortly after this custodial encounter, other law enforcement officers and agents
 14 arrived. These agents and law enforcement officers discovered a "shunt" underneath
 15 the rock ballast in between the railroad tracks. After the shunt was discovered, both
 16 defendants were placed in handcuffs and taken to the Sheriff's patrol car. At this point,
 17 Deputy Chambers read Ms. Reiche her *Miranda* warnings and asked if she understood.
 18 Ms. Reiche immediately invoked her rights and asked for a lawyer. Subsequently,
 19 deputy chambers searched the grocery bag that was sitting on the ground. According to
 20 Deputy Chambers' report, "[i]n the paper bag I observed black wire, gloves, a cordless
 21 drill with brass brush bit, scissors, and tape." The defense asserts that at the time of the
 22 search, neither Ms. Reiche, nor the co-defendant, were within reaching distance of the
 23 bag and that there was no reasonable possibility of gaining access to the bag while in
 24 handcuffs at the police car.

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1 **II. ARGUMENT**

2 **A. The custodial statements made prior to the *Miranda* warnings must be**
 3 **suppressed.**

4 An evidentiary hearing is necessary to determine whether Ms. Reiche was in
 5 custody at the time she responded to Deputy Chambers' questions pre-Miranda. *See*
 6 *United States v. Arbolaez*, 450 F.3d 1283, 1292 (11th Cir. 2006) *citing Jackson v.*
 7 *Denno*, 378 U.S. 368, 380 (1964) (imposing a hearing requirement when a defendant
 8 objects to admission of a confession that the defendant claims was coerced).

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10 1) *Once the law enforcement deputy detained the defendant for trespassing, the*
 11 *deputy had an obligation to Mirandize the defendant.*

12 Law enforcement must recite the *Miranda* warnings to any suspect in custody
 13 before initiating questions that could potentially lead to an incriminating response or
 14 other response that could be used against the suspect. *Miranda v. Arizona*, 384 U.S.
 15 436, 444-45 (1966). To be “in custody” does not necessarily require that the suspect be
 16 taken into police custody or placed in handcuffs. *United States v. Craighead*, 539 F.3d
 17 1073, 1082 (9th Cir. 2008). See also *United States v. Beraun-Panez*, 812 F.2d 578, 580
 18 (9th Cir. 1987) (suspect who was not held in handcuffs was still considered to be “in
 19 custody” given the surrounding circumstances and law enforcement’s efforts to
 20 interrogate the suspect). In cases such as Ms. Reiche, where she was not formally taken
 21 into police custody at the time of the questioning, “a suspect is nevertheless considered
 22 ‘in custody’ for purposes of *Miranda* if the suspect has been ‘deprived of his freedom
 23 of action in any significant way.’” *Id.*, citing *Miranda*, at 444. The analysis requires
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1 the court to consider the totality of the circumstances and ask whether a reasonable
 2 person in those circumstances would have felt she was not at liberty to leave. *Id.* In
 3 other words, “restraint” may be inferred from the surrounding circumstances thereby
 4 requiring law enforcement to recite the *Miranda* warnings. *Id.*, at 1085-86.

5 The sure way to determine whether a suspect is really in custody for *Miranda*
 6 purposes is to check whether law enforcement informed the suspect that she was not
 7 under arrest and was free to leave at any time. *Id.*, at 1087. Such communications
 8 “greatly reduces the chance that a suspect will reasonably believe he [or she] is in
 9 custody.” *Id.*

10 Once law enforcement detains a suspect in preparation for questioning or
 11 interrogation, “there is rarely, if ever, a legitimate reason to delay giving a *Miranda*
 12 warning . . .” *United States v. Williams*, 435 F.3d 1148, 1159 (9th Cir. 2006). The test
 13 for whether a suspect is subject to interrogation, for purposes of *Miranda*, is an
 14 objective one, meaning the subjective intent of the police is not conclusive. *United*
 15 *States v. Williams*, 842 F.3d 1143, 1147 (9th Cir. 2016). One way to determine whether
 16 law enforcement’s questioning is a pretext for an interrogation is to assess whether the
 17 question is designed to elicit a response that can be used against the suspect in court.
 18 *Id.*, at 1148.

19 In the instant case, an evidentiary hearing is needed to establish that Ms. Reiche
 20 was in custody and that Deputy Chambers’ questions were intended to elicit a response
 21 that would be used against Ms. Reiche in court. Specifically, when Deputy Chambers
 22 arrived in the area he saw the two defendants. Deputy Chambers is also expected to

1 testify that the two attempted to run away but halted once he identified himself as the
 2 police and ordered them to stay where they were.

3 Once Deputy Chambers identified himself as a Sheriff's officer and ordered Ms.
 4 Reiche to stop and come to him, Ms. Reiche was in custody. A reasonable person
 5 under these circumstances would not feel free to leave. In fact, Deputy Chambers
 6 expressly placed a restraint on Ms. Reiche when he ordered her to stop and come
 7 directly to Chambers. Ms. Reiche relented by complying with this command and as a
 8 result she was now in a custodial environment even though Deputy Chambers had not
 9 yet placed her in handcuffs. Accordingly, at this point, Deputy Chambers had a duty to
 10 *Mirandize* Ms. Reiche before questioning her about what she was doing trespassing on
 11 BNSF property and what was in the bag that she was carrying.

12 2) *Deputy Chambers' questions were designed to elicit an incriminating*
 13 *response from Ms. Reiche.*

14 While in this custodial environment, where Ms. Reiche was not free to leave,
 15 Deputy Chambers asked Ms. Reiche what was inside the grocery bag that he observed
 16 her holding prior to the seizure. Deputy Chambers will testify that he was suspicious of
 17 the two not only because of this grocery bag being in Ms. Reiche's possession, but also
 18 because the two were dressed in all black with fresh dirt on their clothes while
 19 trespassing on BNSF property at a very late hour in the night. Under these
 20 circumstances, while also in a custodial setting, Ms. Reiche was subject to interrogating
 21 questions because the questions had the goal of eliciting responses that could be used
 22 against Ms. Reiche in court. From Deputy Chambers' perspective, he had just caught
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1 Ms. Reiche trespassing on BNSF property in the middle of the night while wearing all
 2 black clothing and carrying a suspicious bag. Asking a question about what was inside
 3 the bag could only serve one purpose—to elicit an incriminating response.

4 The constitutionally correct approach would have been for Deputy Chambers to
 5 first advise Ms. Reiche that anything she says can be used against her in court and that
 6 she has the right to remain silent. Then, it would have been appropriate for Deputy
 7 Chambers to inquire about the bag and its contents.

8 The subjective intentions of Deputy Chambers is not dispositive. *Williams*, 842
 9 F.3d at 1147. Considering the surrounding circumstances objectively, Deputy
 10 Chambers' questioning served a purpose similar to an interrogation—to get Ms. Reiche
 11 to say something that could be used against her in court. Ms. Reiche was not
 12 *Mirandized* prior to the questioning. Therefore, her responses must be suppressed.

13 **B. The warrantless search of the grocery bag was not a lawful search incident
 14 to arrest. The appropriate remedy for this Fourth Amendment violation is
 15 to suppress the bag and its contents from being admitted at trial.**

16 A search incident to arrest is a well-established exception to the Fourth
 17 Amendment's warrant requirement. *See Arizona v. Gant*, 556 U.S. 332, 338 (2009).
 18 This exception allows an arresting officer to search the person of an arrested suspect
 19 together with the area "within his immediate control". *Chimel v. California*, 395 U.S.
 20 752, 763 (1969). This area has been defined as "the area from within which he might
 21 gain possession of a weapon or destructible evidence." *Id.*

22 In evaluating the reasonableness of a search incident to arrest, the court must
 23 examine two things: First, whether the area searched really was within the arrestee's
 24 "immediate control." Second, whether there were any subsequent or intervening

1 events that would make the search unreasonable. *United States v. Maddox*, 614 F.3d
 2 1046, 1048 (9th Cir. 2010). Similarly, the search must be “spatially and temporally
 3 incident to the arrest.” *United States v. Camou*, 773 F.3d 932, 937 (9th Cir. 2014).

4 In *Maddox*, police stopped the defendant for reckless driving. The police
 5 ordered the defendant out of his car and placed him in handcuffs. The arresting
 6 officer searched the defendant’s pockets and recovered cash. The officer then went to
 7 the vehicle and recovered the defendant’s keys that contained a vial on the keychain.
 8 There was no dispute that the defendant was in actual possession of the key chain and
 9 vial just prior to being ordered out of the vehicle. The officer unscrewed the vial and
 10 discovered methamphetamine. The police attempted to justify the search as a search
 11 incident to a lawful arrest. *United States v. Maddox*, 614 F.3d at 1047-1048. The trial
 12 court disagreed and suppressed the evidence.

13 The Ninth Circuit affirmed the suppression order and ruled that the search of
 14 the key chain vial was not justified under the search incident to arrest exception:

15 [The defendant] was handcuffed in the back of the squad
 16 car, incapable of either destroying evidence or presenting
 17 any threat to the arresting officer. While the key chain was
 18 within Maddox’s immediate control while he was arrested,
 19 subsequent events—namely Officer Bonney’s handcuffing
 car—rendered the search unreasonable.

20 *Id.* at 1048.

21 This reasoning has been followed by other circuits as well. Relying on Ninth
 22 Circuit law, the Third Circuit similarly found it unreasonable to justify a search incident
 23 to arrest where the suspect “was handcuffed behind his back while lying face down on
 24 the floor, and ‘covered’ by two armed police officers” when the police searched a bag
 25 that the defendant possessed just prior to being taken down by police. *United States v.*
 26 *Myres*, 308 F.3d 251, 267 (3rd Cir. 2002), citing *United States v. Hudson*, 100 F.3d

1 1409, 1419 (9th Cir. 1996). *Cf. United v. Johnson*, 18 F.3d 293, 295 (5th Cir. 1994)
 2 (defendant's open briefcase on chair approximately six feet from desk where defendant
 3 was sitting at time officers executed arrest warrant was not within defendant's area of
 4 immediate control at time it was searched), and *United States v. Holbrook*, 2016 WL
 5 454843 (W.D.WA, Feb. 5, 2016)(shopping cart that was in defendant's possession just
 6 prior to arrest was outside her control at the time of the search incident to arrest for
 7 shoplifting/theft).

8 In Ms. Reiche's case, prior to searching the grocery bag, Deputy Chambers
 9 placed Ms. Reiche, and the co-defendant, in handcuffs and moved them both to the
 10 police car. At this time, neither Ms. Reiche, nor Brooks, had access to the grocery bag.
 11 Because they could not gain access to the bag, a subsequent warrantless search of the
 12 bag would be unreasonable and would not meet the requirements of a lawful search
 13 incident to arrest. Therefore, Deputy Chambers needed a warrant before he could go
 14 into the bag to find out what was inside. For these reasons, the bag and its contents
 15 must be suppressed.

16 **III. CONCLUSION**

17 The defense requests an evidentiary hearing to establish the facts needed to
 18 support the motion to suppress both the statements of the defendant and the physical
 19 evidence of the bag and its contents. Following this requested evidentiary hearing, the
 20 defense moves for an order suppressing Ms. Reiche's statements together with the
 21 physical evidence of the bag and its contents.

22 DATED this 23rd day of July, 2021.

23
24 Respectfully submitted,

25 s/ *Jesse Cantor*
 26 Assistant Federal Public Defender
 Attorney for Ellen Reiche